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THE RIGHT TO STRIKE

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Throughout the discussions between employer and employee which now engage public attention, it is constantly asserted that the "right to strike" is protected by the federal constitution and cannot be denied or abridged. The phrase is used very carelessly, and is made the basis for the most extreme claims, and it is therefore important that "the right to strike" should be defined and its limitations brought home to the public.

It must first be borne in mind that under our constitution all men have equal rights and no man or class of men can claim peculiar privileges unless they are granted by constitutional laws. Every person who makes a contract is bound to perform it, unless the contract was obtained by duress or fraud, or performance is excused by some failure of the other party to observe its terms. Employer and employee in this respect are equal before the law.

In the second place, all the rights which either employer or employee has against the other as to the terms of employment are fixed by the contract between them. Before a contract for employment on any railroad or in any factory is made, the employer owns the property and has a right to employ whom he pleases and on such terms as he chooses to fix. No person can demand employment or fix his own terms unless the employer consents.

When a contract is made, it is in substance an agreement by the employee that he will do certain work for certain wages and on certain terms as to hours and conditions of employment, and by the employer that he will pay the wages and comply with the terms. The contract may be for a definite time or may be terminable at the will of either party, but it is safe to say that, with possibly rare exceptions, it gives the employee no interest in the employer's property, and no right to stop working at pleasure without terminating the contract.

Now if the employee under the contract stops work while his contract is in force, because he is dissatisfied with its terms—because, for example, he wants higher wages or shorter hours—he breaks his contract and makes himself liable to damages for the breach. If the term of his contract has expired, or if it contains no term and he stops work, he simply terminates his contract. In both cases the contract is ended by the act of the employee, and his rights, which began with the contract and were entirely derived from it, end with it. *A fortiori* his election to end his contract does not give him new rights which the contract never gave him, like the right to injure his employer's plant, or the right to prevent his employer's hiring other persons.

What is true of a contract between the employer and one employee is also true where a number of persons having similar contracts quit work together. They have no greater rights as a body than each has as an individual, but, were it not for certain statutes and decisions, they would have less rights and might be punished for conspiracy.

The dissenting opinion of Mr. Justice Brandeis in *Truax v. Corrigan*¹ gives the history of the law, showing that the liability to indictment for conspiracy which existed under the common law has been removed by successive statutes, while the civil liability remains unimpaired.

From this analysis it is clear that the right to strike is at best the right to cease work, when to do so does not violate the contract. If it does violate the contract, the employee becomes liable for damages and escapes suit only because the attempt to collect damages would not pay. So far as the term "right to strike" means anything, it means the right for a body of men to cease work together without being liable to punishment for the crime of conspiracy. This immunity from punishment is the privilege which the decisions and some statutes give the striking laborers.

The law can give no man or class of men the right to break a contract. The rights of the other party are property, which can only be taken for public use, and only if just compensation is given or secured to the party from whom they are taken. Hence the law gives no right to strike. The legislature however has the right to say what acts shall be criminal and how they shall be punished. In most states the law has not made a combination to strike a crime, and this enables laborers to quit work as a body without being punished. Properly phrased the right of the employee should be stated not as the right to strike, but as the right not to be punished for striking, and this is not a right secured by any constitution but liable to be taken away at any time by legislation.

The leaders of the employees interpret the "right to strike" as meaning far more than this. For example, in the letter to the President from the eight heads of the Railway Employees' Department of the American Federation of Labor, appears this statement: "Admittedly they have the

¹ (1921) 42 Sup. Ct. 124, 133 *et seq.*

right to strike, and *therefore* they do not forfeit their standing as railroad employees because they do strike." This is a patent *non sequitur*. As well say that if a lawyer abandons his client's case he has the right to represent him against his will, and to be paid for his services.

A more extreme claim is found in the Asheville (N. C.) *Advocate*, a labor organ from which is quoted the following:

"'Why picket?' ask misguided persons. 'Hasn't a strike-breaker the right to work if he wants to?' they inquire.

"The strike-breaker occupies a position analogous to that of the traitor in war. The industrial forces of the nation may be likened unto an army. When we declare war we do not permit any soldier to enlist with the enemy. If one even so much as expresses sentiments which might be construed as giving comfort to the enemy we put him in jail or stand him up before a firing squad.

"This illustration is not overdrawn. It will be appreciated if one pauses long enough to think over the situation created by employment of strike-breakers.

"The army in the field must not allow itself to be honeycombed by the insidious operations of traitors; the industrial army must likewise protect itself."

How this claim is interpreted in practice is familiar to us all, but if proof is needed we have the horrors of the Herrin massacre. The grand jury which investigated that massacre in its report dwells on the action of the strike leader who telegraphed his followers:

"Representatives of our organization are justified in treating this crowd (the Steam Shovel Men's Union) as an outlaw organization, and in viewing its members in the same light as any other common strike breakers."

Immediately after this was received, the grand jury says, "preparations for an attack upon the mine were made," and in that attack a number of men guilty of no offense except honest labor, were murdered and tortured. This was done by striking miners.

The strike of the railroad employees furnishes further evidence. After a full hearing of Attorney-General Daugherty's application for an injunction, Judge Wilkerson in his judgment granting the injunction made the following statement:²

"There began, throughout the country, a series of depredations which rapidly developed in some portions into a veritable reign of terror.

"Railroad bridges were dynamited, spikes removed from rails, obstructions were placed on railway tracks, bombs were exploded on tracks and in railroad yards and hurled at moving trains. Notwithstanding the admonitions of the leaders of the combination to use peaceful means only, the real situation at most of the places where the strike was in

² *United States v. Ry. Employees' Dept. of the A. F. of L.* (1922, D. Ill.) 282 Fed.

progress was that employes were insulted, assaulted and otherwise intimidated. The word of the 'peaceful' picket spoken in the vicinity of the shop was emphasized in the darkness of night by the club and pistol of the 'unknown party.' Regardless of the instructions that no injury must be inflicted on property, there was sabotage on a large scale. Engines, cars and equipment were tampered with and innumerable acts of malicious mischief committed which endangered the lives of both passengers and those operating trains.

"These unlawful acts are shown to have been on such a large scale and in point of time and place so connected with the admitted conduct of the strike that it is impossible on the record here to view them in any other light than as done in furtherance of a common purpose and as a part of a common plan.

"This record does not permit the conclusion that those who are at the head of this combination did not actually know that these things are being done, and that they were the direct result of the methods by which the strike was being conducted. And if they did not actually know they were charged with such knowledge.

"Yet with knowledge of this intolerable situation, nationwide in its scope, the leaders of this combination repeatedly sent out to the members of their organizations bulletins and communications urging the men to greater activity.

"On Aug. 28, 1922, with the record of almost two months of continuous disorder and violence before them, the leaders of these organizations sent out to their members the following:

"If there be any among us who regret the step they have taken let them turn back now so that the brand of Cain can be on them for all time, because this has ceased to be a pink tea or a vacation, but a real he-man strike from now, and if you cannot measure up to that standard, this is no place for you.

"However, keep in mind our policy that the laws of the land must be obeyed, but there is so much that can be done that has not been done without violating the laws, that you are now asked to get on the job and do your damndest and then a little bit more. If the miners could fight five months, then surely our people can, too. They won by sticking.

"We can do likewise and if you are not in this game to do your full duty then step aside and let a man take your place. These may be hard words, but this is war, industrial war and no place for kid gloves or soft talk. Now boys, let's go from here. No surrender."

We have learned that the labor unions, growing bolder by success, claim the right now to arrest the whole business of the country by stopping the running of the railroads, as they threatened to do in order to force the passage of the Adamson bill.

These organizations of laborers absolutely without right have undertaken to cut off the country's supply of coal and to stop the operation of its railroads in order to compel their former employers to take them back as employees on terms which they fixed and to which the employers refused to consent. This meant cutting off the supplies of food upon which the citizens of great cities depended, depriving children of milk, hospitals of ice and other necessities, and inflicting upon their fellow-citizens hardships of all kinds. It meant stopping factories, turning

large bodies of men out of work, entailing in short every sort of disaster upon men, women and children who were not parties to the dispute, or in any way responsible for any ills of which the strikers complained. This is civil war, and recognized as such by the strikers, as is shown by the language already quoted.

If an invading army threatened to stop our railroads and close our mines—to create in this country the conditions which the Germans created in France by destroying the French mines—every power of the state would be exhausted to resist that army and to prevent so great a public calamity. The lives of our citizens, their property and their labor, would be used and we should all applaud the use. When the very same consequences are threatened, not by a hostile enemy but by a body of our own reckless citizens, considering their own interest alone and not the interest of the public, is their right to inflict such injury in their country secured to them by the constitution, and is our government powerless to protect us? To ask the question is to answer it.

If it were proposed in this country to create a board which should have power in its discretion to arrest the whole business of the country until some dispute between some body of employees and their employers was settled, would such a proposition be considered for a moment? If it were considered, should we not insist that the law which appointed the commission contained provisions which would insure the selection of men of the highest character, the largest experience, untainted by any personal interest and with judicial temperament? Should we not go further and insist that before they exercised this terrible power they should investigate from the point of view of the public the nature of the controversy, the requirements of justice to the parties, and how far the importance of the question justified the infliction of terrible injury on the whole country? Should we not insist that pains were taken to secure men entirely without any influence in the success of either party, and fairly representing the public? And after all these requirements have been observed, should we for a moment be willing to entrust such power over our property, our lives and our futures to any body of men, knowing as we should that whatever might be the merits of the original board, no one could foresee who might be their successors, nor what the consequences of their action might be? Is it not clear that the country would never think of creating such a board?

Yet that condition now confronts us. It is in the power of three or four men, like those who terrorized Congress when the Adamson bill was passed, for a while at least to inflict incalculable injury upon the country, such injury as was threatened when Congress consented to pass that measure. Yet these men are not disinterested, they are not judicial, they are not considering the interests of the public. They are simply representing what they conceive to be the interests of a small body of employees, and if the contention of the labor leaders is correct, they can-

not be prevented from exercising that power. If their claim is sustained these irresponsible persons, selected no one knows how, will have a power greater than that of President, Congress, governors, and legislatures.

Can this be so? Very clearly not. The safety of the public is the first concern under any government. *Salus populi suprema lex*. The labor leaders through the repeal of the rule which existed at common law are claiming a power which strikes at the very root of law and order in the state. The true rule was briefly stated by Vice-President Coolidge when, on the 14th of September, 1919, he telegraphed to Samuel Gompers: "There is no right to strike against the public safety by anybody, at any time, anywhere."

Upon principle, as well as upon authority, the power of the state to forbid strikes is clear. Whatever a man has, his life, his property and his labor, is held in trust for the public, and when the public interest demands it, the state can compel him to obey its call. If war breaks out every citizen may be drafted into the army or the navy, or compelled to work in a workshop or in the fields to produce the weapons, the ammunition and the food which are needed for the prosecution of the war. In this crisis private rights yield to the public interest. In like manner in peace a man may be called to serve on the jury, no matter what his private interests may be during a trial lasting perhaps six months, and in certain classes of trial may be secluded from any intercourse with outside persons. He may be summoned as a witness and kept in attendance on a case which in no way concerns him, and only concerns the public in so far as is necessary for the orderly administration of justice. If he is a sailor on board ship he is bound to obey the orders of his commanding officer under penalty of punishment for mutiny, though the number of people on board may be very small and the cargo insignificant. The solitary question in every case is whether the public interest requires that a citizen's individual property, or his individual right shall yield to the public demand. The legislature, which represents the whole people, has the ultimate power to decide what the public interest requires, and what concessions must be made by the private citizen in order to meet the demand.

The first duty of any government is to preserve the public peace, to insure the orderly administration of justice within its jurisdiction. That this is the first purpose of government is perfectly apparent from the phraseology of the law. The man who is indicted is charged with a crime against the peace of the King or against the peace of the Commonwealth, according to the form of government under which he lives. The man who quarrels with another and threatens violence is made to give bond, not that he will abandon his purpose of attacking his enemy, but that he will keep the peace. No private citizen is permitted to collect a debt by physical violence upon the debtor, or to redress any wrong by force, not because the public cares what mischief is done to

the man that is injured, but because the peace of the community cannot be disturbed and its business arrested by quarrels between individuals.

It is clear that the disturbance which contests between individuals may cause is nothing to that which will follow contests between two great bodies of men who differ as to their respective rights, more especially when as now in practice one body of men undertakes to put the public to great inconvenience and suffering or impose upon it enormous loss, in order that for the purpose of escaping this loss or this suffering the public may exert pressure upon the other party. The people of any community are dependent on the regular supply of all the essentials of life, food, clothing, fuel, and also have the right not to have the customary agencies of transportation interfered with or delayed, since such interruption will interfere with the regular supply of what the community must have. Therefore the right of the individual to leave his work must be subject to the paramount right of the public. The engineer who is running a train from one great centre to another can no more stop in the middle of his journey in some desolate place and tell his passengers he will not go on unless they pay him a considerable sum of money than a sailor aboard ship can mutiny to obtain some advantage to himself at the expense of the voyage. The principle admits no distinction. The people through their legislatures can and should insist that labor disputes shall be decided by judicial tribunals and not by civil war, and that we shall not all live subject to the danger of such war whenever labor leaders choose to bring it on.

The power of the government is abundantly sustained by the decisions of the Supreme Court.³ From the case of *Wilson v. New*, we quote the language of Chief Justice White:⁴

"Whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied and the resulting right to fix in case of disagreement and dispute a standard of wages as we have seen necessarily obtained."

And from Mr. Justice McKenna:⁵

"When one enters into interstate commerce one enters into a service in which the public has an interest and subjects one's self to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under

³ *In re Debs* (1895) 158 U. S. 564, 15 Sup. Ct. 900; *Wilson v. New* (1917) 243 U. S. 332, 37 Sup. Ct. 298.

⁴ 243 U. S. at p. 352, 37 Sup. Ct. at p. 303.

⁵ 243 U. S. at p. 364, 37 Sup. Ct. at p. 308.

which it is made and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest."

The following language was used by Mr. Justice Brandeis in *Duplex Printing Press Co. v. Deering*:⁶

"All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

The law is clear. Both in England and the United States the authorities before 1842 continued to hold that a strike was a conspiracy, and for that theory there was much reason. It would seem to be clear that a number of men have no right to combine to injure the business or the property of another, as is done when the strikers resort to what they call "peaceful picketing," or to various acts of violence which always accompany strikes and which striking organizations never in practice punish, but, by acquiescence, encourage.

Mr. Justice Holmes, in *Bailey v. Alabama*, says:⁷

"Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a State adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right, it does not make the laborer a slave.

"But if a fine may be imposed, imprisonment may be imposed in case of a failure to pay it. Nor does it matter if labor is added to the imprisonment. Imprisonment with hard labor is not stricken from the statute books. On the contrary, involuntary servitude as a punishment for crime is excepted from the prohibition of the Thirteenth Amendment in so many words. Also the power of the States to make breach of contract a crime is not done away with by the abolition of slavery. But if a breach of contract may be made a crime at all, it may be made a crime with all the consequences usually attached to crime. If the contract is one that ought not to be made, prohibit it. But if it is a perfectly fair and proper contract, I can see no reason why the State should not throw its weight on the side of performance."⁸

If breach of a contract by a single man can be made criminal, a conspiracy of many men to break their contracts, and more than that, to prevent any other man from doing the work which they refuse to do,

⁶ (1921) 254 U. S. 443, 488, 41 Sup. Ct. 172, 184.

⁷ (1911) 219 U. S. 219, 246, 31 Sup. Ct. 145, 153.

⁸ The court did not adopt this extreme view. It was dealing with a statute of Alabama which made it a criminal offence for a man who, for a payment in money, had with intent to defraud entered into a contract to labor, and after-

coupled with a purpose to use violence against both employees and employer in aid of their conspiracy, can clearly be made criminal. The state has the power to prohibit any acts which endanger the public peace or threaten injury to the lives and property of its citizens. It has the power to enforce the prohibition by appropriate legislation, including indictment and punishment.

In *American Steel Foundries v. Tri-City Central Trades Council*, where picketing had been enjoined by the lower court, Chief Justice Taft used the following language:⁹

"How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people, and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all this the person sought to be influenced has a right to be free and his employer has a right to have him free."

In *Truax v. Corrigan*, referring to the opinion just quoted, he says:¹⁰

"We held that under these clauses picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms which the statute sedulously avoided, but that subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by violence, intimidation, annoyance, importunity, or dogging, it was lawful for ex-employees on strike and their fellows in a labor union to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably to persuade the employees and would-be employees to join them in it."

In the very recent case of *Portland Terminal Company v. Thomas C. Foss*,¹¹ decided on the 29th of July, 1922, Judge Hale, District Judge,

ward broke his contract without just cause and without returning the money, and this statute was held unconstitutional.

It was a case of peonage, and Mr. Justice Hughes in delivering the opinion of the court, said:

"A peon is one who is compelled to work for his creditor until his debt is paid. ***The state may impose involuntary servitude as a punishment for crime, but it cannot compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt." (219 U. S. at pp. 242, 244, 31 Sup. Ct. at p. 152.)

The statute dealt with an offence against an individual, but the rule is very different where the public safety is at stake.

⁹ (1921) 42 Sup. Ct. 72, 76.

¹⁰ 42 Sup. Ct. at p. 132.

¹¹ (1922, D. Maine) 282 Fed.—.

in a very careful and well considered opinion enjoined the Brotherhood of Station Railroad Employees from striking, saying that to do so would be to violate the contract they had made with the plaintiff and inflict upon it irreparable injury.

The whole case may be summed up as follows: The right to strike is only the right to quit work without being liable to punishment for so doing, and that right may be taken away at any time by the legislature which, finding it grossly abused and the public suffering thereby, may restore the criminal law and make it again a criminal offense to combine in any attempt to interfere with the public service, or by striking to inflict any injury upon the public.

The state of Kansas has passed an act¹² which prohibits striking under penalties in four classes of employment in which the public is interested, to wit, the production of food, of clothing, or of fuel, and the business of transportation, at the same time creating a court for the determination of labor disputes. It is an excellent example, and other states may well imitate it. Our experience this summer and the absurd outcry of the labor leaders against the Attorney-General and Judge Wilkerson are educating us all to the dangers of the situation and the imperative demand for similar legislation.

¹² Kan. Laws (1920) ch. 29.